

Comments

***Ex Parte* Contacts Within the FCC: Problem in Accountability**

INTRODUCTION

In 1961, President Kennedy warned against official misconduct involving *ex parte* communication, which he defined as undisclosed, informal contact between an agency official and a party interested in a matter before that official.¹ He echoed what courts had been saying for years: these influences on agency action often do basic injury to the fairness of agency proceedings, particularly when those proceedings are judicial in nature.² After grappling with the problem for another fifteen years, Congress amended the Administrative Procedure Act (APA) to prohibit certain *ex parte* communications.³ APA section 551 defines *ex parte* contact as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter."⁴ Congress made the prohibition applicable only to sections 556-557 formal hearings and formal rulemaking procedures, where the agency's organic statute requires rulemaking "on the record after opportunity for an agency hearing."⁵ These rules established modified trial-type procedures in which *ex parte* contacts are inappropriate to the judicial model the rules follow.⁶

Congress specifically omitted the prohibition from section 553 informal rulemaking procedures, which are modeled after legislative process.⁷ The procedures described in section 553⁸ allow for solicitation of information, discussion and negotiating characteristic of legislative formulation of statutes of general applicability. This section essentially requires publication of the proposed rules in the Federal Register, followed by an opportunity for inter-

1. *Special Message to the Congress on Conflict of Interest Legislation and on Problems of Ethics in Government*, 1961 PUB. PAPERS 326.

2. *Id.* at 331.

3. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) [codified at 5 U.S.C. §§ 556-557 (1976)].

4. 5 U.S.C. § 551(14) (1976).

5. 5 U.S.C. §§ 556(d) and 557(d) (1976).

6. H.R. REP. NO. 94-990, Part II, 94th Cong., 2d Sess. 18 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2227. See also *Morgan v. United States*, 298 U.S. 468, 480 (1936) (while predating the APA, the case states well the principles behind the administrative hearing).

7. *Hearings Before Subcommittee on Reorganization, Research and International Organizations of Committee on Government Operations*, 93d Cong., 2d Sess. 214-15, 219, 248-49 (1974) (testimony urging that the *ex parte* contact prohibition be limited to formal agency action and distinguishing formal agency action from informal rulemaking procedures). See also Comment, *Ex parte Contacts in Informal Rule Making: The "Bread and Butter" of Administrative Procedures*, 27 EMORY L. J. 293 (1978).

8. 5 U.S.C. § 553 (1976).

ested persons to submit to the agency written and, in some cases, oral comments on the rules.

While no one has seriously challenged an agency's right to engage in *ex parte* communications in informal rulemaking procedures,⁹ the APA does not give agencies or courts any specific guidance in determining when *ex parte* contacts are unacceptable. In the absence of specific standards for *ex parte* contacts, courts have evaluated these informal communications within a framework of basic fairness and democratic principles, requiring government accountability and reasoned decisionmaking.¹⁰ They have not inquired deeply into *ex parte* contacts in particular situations unless there has been some evidence of contacts thwarting the purposes of the APA procedures.¹¹ In addition, participants in the administrative process have emphasized the importance of agencies' eschewing the appearance of impropriety suggested by secretive activities and of maintaining public confidence in agency actions.¹²

In general, recent court decisions¹³ and the APA amendments¹⁴ signal a trend toward more openness in government and increasing pressures by special nonindustry and public interest groups demanding greater rights of participation in formulating agency policy. This Comment will examine three recent cases involving the Federal Communications Commission, cases which have been concerned largely with the Commission's reliance on *ex parte* communication in its decisionmaking process. Part I will discuss the peculiar statutory mandates to the FCC, which make *ex parte* communication a method of effecting policy particularly appealing to the Commission. Part II will set out the three cases to be discussed. Following the cases, the three situations will be compared in Part III in terms of traditional *ex parte* contacts analysis. It will be shown that when the direction of the communication is predominantly from the government to the regulated industry, other dimensions of the infor-

9. Although *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), found all *ex parte* contact in informal rulemaking impermissible, that decision has been distinguished and limited, leaving little doubt that *ex parte* contacts are acceptable in the informal rulemaking context.

10. See *Courtaulds (Alabama), Inc. v. Dixon*, 294 F.2d 899 (D.C. Cir. 1961) (party seeking to overturn agency action had also made *ex parte* contacts with agency; decided on theory of fairness, not on unclean hands); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959) (basic fairness requires that proceedings involving competing private claims to a valuable privilege be carried on in the open and not *ex parte*); *Van Curler Broadcasting Corp. v. United States*, 236 F.2d 727 (D.C. Cir.), *cert. denied*, 352 U.S. 935 (1956) (no evidence that agency was swayed by *ex parte* contacts resulting in unfair treatment).

11. See cases cited in note 10 *supra*.

12. Testimony of former FCC Commissioner Glen O. Robinson before House Government Information and Individual Rights Subcommittee on Government in the Sunshine Act, H.R. REP. NO. 94-880, 94th Cong., 2d Sess. 2 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2184.

13. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970); *Office of Communications of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

14. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), *as amended by* Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (1976)); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. (1976)) (requires opening to the public meetings of advisory committees, study panels, and ad hoc committees in the executive branch); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (relevant sections of which are codified at 5 U.S.C. §§ 551(14), 556(d), and 557(d) (1976)).

mal contacts will have to be scrutinized to prevent government coercion and promote government accountability in agency actions. The section concludes with a discussion of *ex parte* communication as an extrastatutory tool of regulation to effect agency policy. Concluding remarks appear in Part IV.

I. THE STATUTE

The Communications Act of 1934¹⁵ is the statutory authority for the FCC's regulation of broadcasting. Despite monumental changes in the technology, the Act remains virtually unchanged,¹⁶ and commissioners, lawyers, broadcasters, and others with broadcast interests are grappling with the same old problems with the Act, as well as with new ones.

First, the Act gives no clear mandate in provisions that are concerned with *what* is to be broadcast, unlike its help with the *how*. The Commission is required to act in light of the "public convenience, interest, or necessity,"¹⁷ and "generally to encourage the larger and more effective use of radio [and of course now, television] in the public interest."¹⁸ Unlike the monolithic, identifiable "public" the drafters had in mind, the public has proved to be a "gaseous vertebrate,"¹⁹ whose cause is championed by many competing groups and whose needs are not homogeneous and cannot be met by some Ten Commandments of broadcast regulation.²⁰ Since "public interest" has virtually no meaning in many policy-making situations, the FCC must acquiesce to the definition of that term espoused by those with power over the Commission. Congress need only say, "That is not what *we* mean by the public interest," for the FCC to find appropriations on the line.²¹

Because the FCC does not have the resources to maintain a constant adversary stance in its role of industry watchdog, it must rely to some extent on industry cooperation to carry out its regulatory function.²² Implicit in industry cooperation is the requirement that the Commission weigh heavily what the industry means by "the public interest."²³

The real problems for the Commission come up when the demands of those groups assuring its continued existence and smooth operation are in

15. 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-609 (1976)).

16. E. KRASNOW, *THE POLITICS OF BROADCAST REGULATION* 9 (1973).

17. 47 U.S.C. § 303 (1976).

18. 47 U.S.C. § 303(g) (1976).

19. Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485, 498 (1940).

20. See B. COLE, *RELUCTANT REGULATORS* 63-81 (1978); E. KRASNOW, *supra* note 16 at 16-17; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 193-95 (1978).

21. E. KRASNOW, *supra* note 16, at 16. Since Congress has been reluctant to update the 1934 Act, it has used a variety of informal procedures to direct and oversee the Commission, including hearings, investigations, and studies. The result is that these informal procedures escape review by the whole Congress and "enable legislators to advance personal or constituent interests without the need for a full-scale political battle. . . . [T]he FCC is constantly aware that it is an arm of Congress." *Id.* at 70.

22. *Id.* at 16, 31-36. See also Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975).

23. E. KRASNOW, *supra* note 16, at 16; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87 (1975).

conflict. This dilemma leads to decisions fashioned to produce as little political conflict as possible.²⁴ Hence, the Commission chairmen see themselves not as leaders of an independent agency, but as negotiators of all divergent positions, looking for the most politically acceptable policy and acting much like congressional legislators.²⁵

Second, the Act creates tension in its grant of authority to the FCC. On the one hand, it requires the Commission to regulate the broadcast media in the public interest, which clearly requires some attention to program format and content.²⁶ On the other hand, section 326 of the Act clearly warns against too much concern with program content²⁷ since this content is protected by the first amendment.²⁸ The Commission has been characterized as walking a tightrope between the public interest and censorship.²⁹

One is left with an agency cautious in acting, eager to encourage industry self-regulation, eager to avoid committing itself to rules, especially on potential constitutional questions, and eager to placate all of its "publics." It is against this backdrop of statutory and political conditions that the three cases herein are set.

II. THE CASES

The cases to be discussed include *Home Box Office, Inc. v. FCC*,³⁰ *Action for Children's Television, Inc. v. FCC*,³¹ and *Writer's Guild of America, West, Inc. v. FCC*.³² The first two cases were heard on appeal of an FCC final order in the District of Columbia Circuit Court of Appeals. *Writer's Guild* was brought in the United States District Court for the Central District of Cali-

24. E. KRASNOW, *supra* note 16, at 16-17 (citing A. LEISERSON, *ADMINISTRATIVE REGULATION: A STUDY IN REPRESENTATION IN INTERESTS* 16 (1942)): "[A] satisfactory criterion of the public interest is the preponderant acceptance of administrative action by politically influential groups." See also Noll, *Selling Research to Regulatory Agencies*, in *THE ROLE OF ANALYSIS IN REGULATORY DECISION-MAKING: THE CASE OF CABLE TELEVISION* (R. Park ed. 1973).

25. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683 (1975): "Today, the exercise of agency discretion is inevitably seen as a legislative process of adjusting competing claims of various private interests affected by agency policy." See also Williams, *Securing Fairness and Regularity in Administrative Proceedings*, 29 AD. L. REV. 1, 7-8 (1977).

26. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940): "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." In *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943), Justice Frankfurter elaborated:

The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by [sic] radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity."

27. 47 U.S.C. § 326 (1976).

28. See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

29. *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Inst. v. FCC*, 396 U.S. 842 (1969).

30. 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

31. 564 F.2d 458 (D.C. Cir. 1977) [hereinafter referred to as *ACT*].

32. 423 F. Supp. 1064 (C.D. Cal. 1976), *rev'd sub nom. Writer's Guild of America, West, Inc. v. American Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

fornia.³³ All three cases raised substantial questions concerning the propriety of *ex parte* contacts between the FCC and industry members during informal rulemaking activities.

Home Box Office is raised simply to illustrate a case in which the traditional analysis³⁴ of *ex parte* contacts was appropriate. *ACT* and *Writer's Guild* illustrate the inadequacy of the traditional analysis in another kind of circumstance in which *ex parte* contacts are at issue. In comparing the approaches of the two courts in the latter two cases to basically the same *ex parte* situation, the problems of a strict application of the APA informal rulemaking procedures will be illuminated.

A. Home Box Office, Inc. v. FCC

In *Home Box Office*, a pay cable television company challenged the FCC procedures followed in the adoption of rules restricting and regulating pay exhibition of programs on cable systems.³⁵ The Commission had followed APA section 553 informal rulemaking procedures. An additional, self-imposed rule cut off the submission of comments to the Commission by interested parties on the last day of oral testimony.³⁶ Despite its own rule, the Commission continued to receive undisclosed information from various industry parties (and not from public intervenors) during the five months after the closing of the record and prior to the announcement of the rules.³⁷

After reviewing the number and nature of the *ex parte* contacts, the court expressed concern for "undue industry influence over Commission proceedings" and a fear that the rules were the result of compromise among the competing industry forces, rather than an independent judgment made by the Commission in the public interest.³⁸ Not only was the court concerned with the "inconsistency of secrecy with fundamental notions of fairness," but also with the *ex parte* contacts' interference with effective judicial review.³⁹ The court pointed out that the effect of the *ex parte* contacts was to create an official record for judicial review minus the apparently influential discussions between industry and the Commission, making it difficult for the court to determine the rationality of the Commission's final rules.⁴⁰

33. The court found that it had jurisdiction and that the FCC did not have exclusive jurisdiction. Because there had been no agency "proceeding" or "order," the review provisions of the Communications Act had not been triggered. 423 F. Supp. 1064, 1074-84 (C.D. Cal. 1976).

34. The "traditional analysis" is concerned with basic fairness in agency decision making, undue industry influence on agency actions, and occasionally with whether an administrative record is sufficient to facilitate effective judicial review. The concern is for the regulated industry's attempts to influence the regulatory body. See generally Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rule-making Proceedings*, 30 AD. L. REV. 377 (1978).

35. 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

36. *Id.* at 53.

37. *Id.*

38. *Id.*

39. *Id.* at 54.

40. *Id.*

B. Action for Children's Television v. FCC

In *ACT*, the court again faced the issue of *ex parte* contacts.⁴¹ The "kidvid" controversy arose in 1970 when Action for Children's Television (ACT), a nonprofit Massachusetts corporation, requested that the FCC consider proposals for regulations for children's television, primarily in the area of commercial sponsorship of those programs.⁴² In particular, it urged: (1) that there be no sponsorships and no commercials on children's programs; (2) that no performer or children's show host be permitted to use or mention products, services, or stores by brand names during children's programs; and (3) that daily programs for children be provided, with no fewer than 14 hours per week of children's programming, with certain times of the day designated for each age category (preschool, primary ages six to nine, and elementary ages ten to twelve).⁴³

The Commission treated the proposal as a petition for rulemaking and issued a notice inviting comments on the suggested rules. The enormous response found, predictably, members of the public supporting the rules and members of the industry objecting to them.⁴⁴ The FCC decided to conduct its own study, held public hearings, collected both written and oral comments, and eventually issued detailed findings supporting its decision not to promulgate rules.⁴⁵ Its primary reason was the industry's "willingness to improve the quality of children's television by self-regulation."⁴⁶

The self-regulation the report referred to was the changes the National Association of Broadcasters (NAB), the industry's trade association, had made in its television code, which NAB members are required to follow.⁴⁷ The main thrust of the reforms included limiting (but not eliminating) the amount of commercial time accompanying children's programs, restricting host or hero selling, clearly separating programs and advertising content, and changing commercials to comport with safety standards and to eliminate certain deceptive selling practices.⁴⁸ Satisfied with the industry efforts, the Commission commended industry self-regulation but warned twice that if self-regulation failed to reduce the level of advertising during children's programming, per se rules or some other unspecified agency action would be necessary.⁴⁹

ACT formally requested that the FCC reconsider its decision not to adopt rules.⁵⁰ The Commission denied the request and ACT appealed to the court of

41. 564 F.2d 458 (D.C. Cir. 1977).

42. *Id.* at 461.

43. *Id.* at 462.

44. *Id.* at 463.

45. For more information on the controversy, see B. COLE, RELUCTANT REGULATORS 242-310 (1978).

46. *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1 (1974), cited in 564 F.2d 458, 464 (D.C. Cir. 1977) [hereinafter referred to as *Report*].

47. National Association of Broadcasters, *Television Code* (first issued in 1952).

48. 564 F.2d 458, 464 (D.C. Cir. 1977).

49. *Report*, *supra* note 46, at 13-14.

50. 564 F.2d 458, 468 (D.C. Cir. 1977).

appeals.⁵¹ ACT condemned the FCC's failure to solicit comments on the industry's self-regulation proposals, which were negotiated behind closed doors in Chairman Wiley's office and which the industry was coerced into accepting in the face of threatened regulatory action.⁵² They charged that such acts undermined legal administrative process, particularly in denying public participation at every stage of the regulatory process. In addition, they claimed that since the informal negotiations with the NAB were off-the-record, the record the court was reviewing was devoid of information on which the industry self-regulation policy was based. They claimed that the *ex parte* contacts made the extensive comment gathering stage "little more than a sop."⁵³

Step by step the court countered ACT's charges, pointing out that the FCC had followed not only the letter of the law, but had even gone beyond the bare requirements by holding public hearings and subsequent oral argument.⁵⁴ The court found that the Commission had been in substantial compliance with the APA procedures, and while ACT had not had any input in the industry self-regulation decision, it had been given what it was entitled to, namely, meaningful participation in the rulemaking process.⁵⁵

In addition, the court commended the Commission for issuing its lengthy report, which was more than the minimum explanation required by the APA. The report contained evidence that ACT's participation in the overall proceedings had been influential in the Commission's final decision.⁵⁶

As for ACT's charge concerning secret meetings between the Commission and the NAB, the court said that while the meetings might have been "impolitic," they did not constitute an abuse of the agency's discretion.⁵⁷

Addressing ACT's charge of coercion of industry compliance with the FCC's self-regulation decision, the court basically defended the Commission's action as completely within its discretion.⁵⁸ It affirmed the Commission's right to have discussions with industry members in a "general effort to have its regulatees conform to their public service obligations" and implicitly approved FCC efforts to effect "salutary self-regulation."⁵⁹

The court conceded that there could be times when agency efforts to encourage licensees to meet their public service responsibilities could involve undue pressure from the agency; such "jawboning" would be considered an improper exercise of agency discretion. It felt, however, that there was no evidence of coercion in this case and that whatever coercion the industry had been subjected to had flowed from ACT's activities.⁶⁰

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 471.

55. *Id.*

56. *Id.*

57. *Id.* at 473.

58. *Id.* at 471 n.27.

59. *Id.*

60. *Id.*

C. *Writer's Guild of America, West, Inc. v. FCC*

In setting out to make changes in children's programming, Chairman Wiley had acted with complete confidence that encouraging self-regulation would meet no serious challenge in the courts.⁶¹ He was so encouraged with the results of his "jawboning" efforts with the children's programming situation that he decided to follow basically the same tack in taking on violence and sex in television.⁶²

As with children's programming, regulating program content presented ticklish constitutional problems.⁶³ Wiley had not wanted to get involved in these areas, but the message from Congress was that if the Commission did not act to control violence and sex, punitive measures would be taken against the Commission.⁶⁴

In June, 1974, the House Appropriations Committee ordered the FCC to report to that group by December 1974 on what measures the Commission could legally take to protect children from excessive programming of violence and obscenity.⁶⁵ Wiley was convinced that the Commission could not establish program content standards for granting licenses and renewals that were proscribed under section 326 of the Communications Act.⁶⁶ To his thinking, the only available alternative was to attempt to effect changes in the NAB Code as he had done with children's programming.⁶⁷ Making this task difficult were the time constraints Congress had placed on him. The shaping of the children's commercial rule changes in the Code covered a period of approximately five years of in-depth investigation and negotiations.⁶⁸ For this next task, Wiley did not even have enough time to meet APA procedural requirements.⁶⁹ He embarked, therefore, on a program of negotiating with the networks without notice to or participation from any other groups potentially interested in the outcome.⁷⁰

At one point, former commissioner Nicholas Johnson, who was then serving as chairman of the National Citizens' Committee for Broadcasting, wrote to Wiley asking that members of the Committee or other members of the public be allowed to attend the negotiating sessions with industry. Wiley refused, saying that he saw no purpose in opening the meetings to groups such as Johnson's.⁷¹ He continued to negotiate, somewhat bolstered by support from CBS president Arthur Taylor, who had been experimenting at CBS with reduced violence in children's programming.⁷²

61. B. COLE, *RELUCTANT REGULATORS* 284 (1978).

62. *Id.*

63. *Writer's Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1097 (C.D. Cal. 1976).

64. *Id.* at 1095.

65. *Id.* See also G. COWEN, *SEE NO EVIL* 86 (1979).

66. *Writer's Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1095 (C.D. Cal. 1976).

67. *Id.* at 1097 n.39.

68. G. COWEN, *SEE NO EVIL* 85-93 (1979).

69. *Id.*

70. *Id.*

71. 423 F. Supp. 1064, 1101 (C.D. Cal. 1976).

72. *Id.* at 1100.

What was apparent to each of the network heads with whom Wiley chose to confer was that Congress was putting the heat on the Commission and that Wiley meant to meet the December deadline.⁷³ It was clear that the networks had better go along or the matter would be taken out of their hands and they would be subject to either legislation or FCC rules, both of which were heinous choices for the industry. Their flexibility and autonomy were in jeopardy, the costs of compliance prohibitive.⁷⁴ As a result, Wiley and the network heads were able to cajole the NAB into adopting a policy which became known as the family viewing hour, which provided that: (1) the hours from 7 to 9 p.m. (6 to 8 p.m. central time) would be reserved for programs "suitable for family viewing"; (2) on occasions when material inappropriate for family viewing was to be shown during those hours, a notice of the program's questionable content would be advertised in printed schedules prior to the program's airing; and (3) during any viewing hours, stations would alert viewers to programs when the material "might be disturbing to a significant portion of the adult audience."⁷⁵ Having achieved the Code changes, the FCC reported to Congress that in light of the amendments, no government regulation in this sensitive constitutional area appeared to be necessary.⁷⁶

As a result of these Code changes, some programs previously scheduled for airing in the family viewing time slots either would have to be moved to a later time or would have to be scrapped or reworked to avoid any possible violations of the family viewing hour policy. The most exasperating problem for writers and producers was that no one knew exactly what "inappropriate for family viewing" meant.⁷⁷ One network executive saw its effect as being largely changes in language, such as the omission of the words "hell" and "damn" heard so often coming from Archie Bunker's mouth.⁷⁸ A censor for the same network, working without guidance from his superiors or the NAB, was enforcing a standard of avoiding material in programs that would embarrass "the most uptight parent that could be imagined."⁷⁹

Faced with what they considered outrageous censorship, writers, directors, producers, and actors—most notably Norman Lear and his Tandem Productions, a California corporation—initiated two suits, which were combined in the United States District Court for the Central District of California.⁸⁰ They charged the FCC with violations of the first amendment, the Communications Act of 1934, and the APA for failure to employ even the barest minimum section 553 procedures in foisting the family viewing policy on them. They charged the networks and the NAB with violation of the Sherman Antitrust Act.⁸¹ In a lengthy, painstaking opinion, District Judge

73. G. COWEN, *SEE NO EVIL* 68 (1979).

74. *Id.* at 100-15. *See also* 423 F. Supp. 1064, 1099 (C.D. Cal. 1976).

75. 423 F. Supp. 1064, 1104 (C.D. Cal. 1976).

76. *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418 (1975).

77. 423 F. Supp. 1064, 1124-26 (C.D. Cal. 1976). *See also* G. COWEN, *SEE NO EVIL* 116-41 (1979).

78. 423 F. Supp. 1064, 1124-26 (C.D. Cal. 1976).

79. *Id.*

80. *Id.* at 1072.

81. *Id.*

Ferguson found that the FCC had violated the first amendment and the APA, but found that the Communications Act provided no private cause of action for the plaintiffs.⁸²

The court held that the FCC, working in concert with the networks and the NAB, had undermined the decentralized character of the broadcasting system and had taken monopolistic control over television, imperiling the rights of the plaintiffs and the "paramount" rights of viewers.⁸³ The opinion went on to point out that the purpose behind Congress' adopting the informal rulemaking procedures of the APA was the recognition that members of the industry and other interested parties had a right to participate in agency decisions.⁸⁴ Congress assumed that the quality of decisions would be improved with such input. The court found that the Commission had completely disregarded the required APA procedures in its role in the family viewing hour negotiations, providing no notice and no opportunity for interested parties to be heard.⁸⁵

On appeal to the United States Court of Appeals, Ninth Circuit,⁸⁶ the court never reached the first amendment and APA issues, but decided that the district court had not had jurisdiction to hear the complaint under the doctrines of primary jurisdiction⁸⁷ and exhaustion of remedies.⁸⁸ It therefore vacated the judgment and held in abeyance plaintiffs' claims against the private defendants until the plaintiffs took their complaint against the FCC first to the FCC and possibly on appeal to the District of Columbia Circuit.⁸⁹ The United States Supreme Court has refused to hear plaintiffs' appeal.⁹⁰

For purposes of this Comment, what is important are the uncontroverted facts of Wiley's negotiating with the industry without employing APA procedures in a matter of great public concern. The Commission's pressure on

82. *Id.* at 1084. The Supreme Court in *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942), held: "The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications." Accordingly, it has been subsequently held that the FCC is the 'primary and exclusive forum' in which to initiate complaints based on the Act. *Ackerman v. Columbia Broadcasting System, Inc.*, 301 F. Supp. 628, 631 (S.D.N.Y. 1969).

83. 423 F. Supp. 1064, 1143-44 (C.D. Cal. 1976).

84. *Id.* at 1151, (citing *Texaco, Inc. v. FPC*, 412 F.2d 740, 744 (3rd Cir. 1969)).

85. 423 F. Supp. 1064, 1151 (C.D. Cal. 1976).

86. *Writer's Guild of America, West, Inc. v. American Broadcasting Corp.*, 609 F.2d 355 (1979).

87. *Id.* at 363. Primary jurisdiction was explained in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940):

Primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case judicial process is suspended pending referral of such issues to the administrative body for its views.

The appellate court believed that the Communications Act provides such a regulatory scheme.

88. 609 F.2d 355, 363 (9th Cir. 1979). Likewise, the doctrine of exhaustion of remedies was explained in *General American Tank Car Corp. v. Eldorado Terminal Co.*, 308 U.S. 422, 433 (1940): "Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." The Court was uncertain exactly which of the two doctrines applied, but felt certain that at least one of them was a sufficient basis for requiring that plaintiffs' complaint be presented to the FCC first. *Id.*

89. 609 F.2d 355, 358 (9th Cir. 1979). The statutory review procedure for those aggrieved by the FCC is set out in 47 U.S.C. §§ 402(a) and 405 (1976).

90. 449 U.S. 824 (1980).

the industry to adopt a family viewing policy, supported by agency threats to regulate should self-regulation fail will also be discussed.

III. THE *EX PARTE* CONTACTS

In much of the literature, *ex parte* contacts are treated as presenting essentially the same issues as those raised in *Home Box Office*, namely, fundamental fairness and effective judicial review.⁹¹ The *ex parte* contacts in that case were industry attempts to influence the agency.⁹² But the nature of the *ex parte* contacts in both *ACT* and *Writer's Guild* involved off-the-record government attempts to influence private industry.⁹³ While concern remains for giving a fair hearing to all interested parties, new concerns with unauthorized and arbitrary government action arise, issues the traditional analysis does not address.

In *ACT*, the court's finding that *ex parte* contacts were proper within the scope of the APA allowed the FCC to escape responsibility for arguably unconstitutional regulation which was (1) accomplished through informal agency action rather than through the public procedures which were being employed simultaneously; (2) implemented through a private party (the NAB); and (3) backed by FCC threats. The major problems apparent when *ex parte* contacts are employed as an extrastatutory method of adopting "rules" are lack of government accountability and the danger of government coercion.

There are three problems with the FCC's actions which potentially compromise government accountability. First, it is difficult to determine on whose behalf the Commission was acting. Second, a government agency used the private agency to accomplish what it believed it could not do, namely censor program content. Third, since through the NAB the government had effected censorship, licensees, writers, producers, and other aggrieved parties were left without recourse against the government, the actual perpetrator of what probably was a first amendment violation.

A. The "Public Interest"—Accountable to Whom?

FCC action in both *ACT* and *Writer's Guild* was the result of basically the same pressures: some public concern, long-standing concern by influential congressmen, and the conclusions of a Surgeon General's report about the adverse effects on children of violence in television.⁹⁴ If the public interest standard requires the Commission to answer to the majority of the viewing public, Commission efforts to clean up television have questionable support.

91. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:18 (1978); Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377 (1978).

92. 567 F.2d 9, 56 (D.C. Cir. 1977).

93. See generally 423 F. Supp. 1064 (C.D. Cal. 1976); G. COWEN, *SEE NO EVIL* 85-93 (1979).

94. REPORT TO THE SURGEON GENERAL, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVISION VIOLENCE* (1970).

When ACT approached congressmen, most notably Senator John Pastore, it had fewer than 200 members.⁹⁵ While its membership eventually grew and the FCC received significant public comment on children's programming in response to its notice of rulemaking, actual widespread public support for changes in children's television was never clearly established.

One survey showed that forty percent of those interviewed were concerned about violence and sex in television programming,⁹⁶ but the same study showed that only four to seven percent ever changed their children's viewing to avoid unacceptable programs.⁹⁷ In addition, CBS had experimented unilaterally with removing programs to which parents objected because of their violent content.⁹⁸ Competing networks bought CBS's discarded programs, aired them opposite CBS's new improved children's shows, and took away CBS's audience with the supposedly objectionable programs.⁹⁹ Programs thought to be unacceptable were the money-makers; they were succeeding in a system with exacting accountability—the marketplace.

If the "public interest" of concern to the FCC was not the interests of a majority of viewers, the question of whose interest it was representing remains. ACT was not satisfied with the FCC's representation of its members' interests.

In *Writer's Guild*, the district court also questioned on whose behalf the Commission was acting.¹⁰⁰ It made reference to a portion of Chairman Wiley's testimony taken during the trial:

Q. (By the court) You know, there is a great movement afoot and the pressures are getting bigger and bigger from what I sense of this trial that there [are] an awful lot of parents who completely disagree with the approach the networks have taken, and who don't have a voice and who can't present to the Chairman of the FCC their point of view. They want a voice, they want to be heard and you foreclosed them from being heard.

A. (Chairman Wiley) No, your Honor. *I was speaking for them; that's the thing.*¹⁰¹

Whether Chairman Wiley could accurately gauge public opinion, however, was not the issue. Rather the claim was that the Commission made no public effort to be sure that it had acted in the public interest by hearing out the public "through orderly process."¹⁰²

B. *The Whodunit — FCC or NAB?*

The principle of government accountability is dealt another blow when the FCC is able to require a private party, the NAB, to take action which the

95. B. COLE, *RELUCTANT REGULATORS* 252 (1978).

96. E. NOLL, *ECONOMIC ASPECTS OF TELEVISION REGULATION* 13 (1973).

97. *Id.*

98. *Writer's Guild of America v. FCC*, 423 F. Supp. 1064, 1094, 1150 (D.C. Cal. 1976); G. COWEN, *SEE NO EVIL* 76-79 (1979).

99. 423 F. Supp. 1064, 1094, 1150 (C.D. Cal. 1976); G. COWEN, *SEE NO EVIL* 76-79 (1979).

100. 423 F. Supp. 1064, 1151-52 (C.D. Cal. 1976).

101. *Id.* (emphasis added).

102. *Id.* at 1152.

government believes cannot be compelled. In *ACT*, the court applied APA section 553 strictly, using traditional *ex parte* contact analysis, thus camouflaging the FCC's influence on NAB Code changes.

The *Writer's Guild* district court cut through this charade and found government action in similar FCC efforts to cause self-regulation. The court cautioned that it was not objecting to the FCC's *ever* suggesting to the industry a policy in tune with broadcasters' public interest responsibility.¹⁰³ It recognized that this FCC practice when used properly was in conformity with the statutory requirement that the FCC "generally encourage the larger and more effective use of radio in the public interest."¹⁰⁴

What it could not tolerate was the coercive tenor of these particular FCC suggestions. It said that if the first amendment were to have any meaning for broadcasters, licensees should have the right to reject any FCC suggestions without fear of FCC retribution.¹⁰⁵ When the suggestions involve problems for which formal regulation would be constitutionally questionable, the appearance of government pressure would have to be avoided.¹⁰⁶

The difference in the two courts' analyses of basically the same situation is striking. In both *ACT* and *Writer's Guild*, the FCC chairman worked behind the scenes to effect NAB Code changes to avoid the Commission's involvement in a constitutionally sensitive area.¹⁰⁷ In *ACT*, the report announcing FCC no-action warned that the failure of self-regulation would mean the Commission would impose regulations on the industry.¹⁰⁸ The Commission added questions to the license application to monitor each licensee's compliance with Code changes.¹⁰⁹ In *Writer's Guild*, the Commission was threatening essentially the same terribles when it was attempting to create the family viewing hour.¹¹⁰

Referring to the pending *Writer's Guild* district court decision, the *ACT* court attempted to distinguish the supposedly different FCC approaches in the two cases.¹¹¹ It described the FCC action in *Writer's Guild* as possibly being a higher degree of encouragement, sufficient to constitute arm twisting tactics, called "jawboning."¹¹² Otherwise, it rested its distinctions primarily on the absence of APA procedures in *Writer's Guild*. In a rather conclusory manner, the court said that in the *ACT* proceedings, it was "satisfied that the Commission did not coerce the industry into accepting agency-decreed policies or standards negotiated at closed door meetings."¹¹³

Even Chairman Wiley believed that he was using the same technique in

103. *Id.* at 1150.

104. *Id.*

105. *Id.* at 1146, 1150.

106. *Id.* at 1150.

107. See text accompanying notes 52-79 *supra*.

108. *Report, supra* note 46, at 13-14.

109. *Action for Children's Television v. FCC*, 564 F.2d 458, 467 (D.C.Cir. 1977).

110. 423 F. Supp. 1064, 1142, 1155-56 (C.D. Cal. 1976); G. COWEN, *SEE NO EVIL* 189-90 (1979).

111. 564 F.2d 458, 473 n.27 (D.C. Cir. 1977).

112. *Id.*

113. *Id.*

implementing the family viewing hour that he had used in the *ACT* negotiations with the industry.¹¹⁴ The major difference seems to be that in the *ACT* situation, the Commission used APA procedures. In *ACT*, open threats to force self-regulation were found acceptable. In *Writer's Guild*, similar threats *sub rosa* were unacceptable. Despite procedural differences in the two cases, the effect on the industry and the freeing of FCC from responsibility were accomplished in the same way. When APA section 553 procedures shield activities similar to those found unacceptable in *Writer's Guild*, they seem to become window dressing.

Whether the court ignores *ex parte* contacts or chooses to find reviewable agency action therein is critical to the third accountability problem with the FCC's informal action — legal recourse for the aggrieved parties. If courts conclude that the Commission is not responsible for private regulation induced by FCC threats, how will licensees, writers, and producers have any recourse against government-initiated action? The question is whether the FCC can avoid responsibility for what even it believes to be a probable violation of the first amendment.

As the law stands now, the *ACT* decision is the rule, and the FCC is free to circumvent its accountability by following APA procedures and taking full advantage of *ex parte* communications channels. Should the plaintiffs decide to pursue their claim through the FCC and appeal to the District of Columbia Circuit, it will be difficult for the appellate court to resist the appeal of Judge Ferguson's arguments if it is asked to review the family viewing hour negotiations.

C. Extrastatutory Tools of Regulation

Of particular concern to the district court in *Writer's Guild* was the FCC's skirting the informal rulemaking procedures of the APA.¹¹⁵ It warned that if the informal negotiating that had occurred were allowed to go on, the APA's provisions would become meaningless.¹¹⁶ It went on:

The government could sit down at a table with the regulated industry, negotiate policy, delegate to the industry the power to enforce the policy, mouth empty words of congratulations about self-regulation, issue cynical denials of government responsibility, and avoid the Act entirely. Such procedures would permit government and industry to seal out the public from the decisionmaking process and to frustrate judicial review.¹¹⁷

The court objected to the FCC methods because they afford no protection to the public, are not authorized by statute, and violate the long established rule that when the Commission wishes to impose new duties on its licensees, it

114. B. COLE, RELUCTANT REGULATORS 284 (1978).

115. 423 F. Supp. 1064, 1152 (C.D. Cal. 1976).

116. *Id.*

117. *Id.*

will always open the proposal to the public scrutiny and debate through the prescribed rulemaking procedures.¹¹⁸

The *Writer's Guild* appellate court attempted to mollify the district court's attack on the jawboning technique as a method of inducing industry self-regulation.¹¹⁹ It referred to the "salutary effect of diminishing the need for formal governmental intervention and regulation."¹²⁰ It conceded that upholding these methods gives the FCC broad and largely uncontrolled administrative discretion in reviewing programming, which could be used to put improper pressure on licensees.¹²¹

Despite this concession to the district court's concerns, the appellate court declined to decide the issue of the appropriateness of jawboning in the particular case, requiring instead that the plaintiffs follow Communications Act and APA procedures in taking their complaint to the Commission before initiating other judicial review.¹²² Still undecided by these cases is the legitimacy of extrastatutory agency action beyond simple information gathering.

Interestingly, the *Writer's Guild* district court was enamored of requiring APA procedures in this case in order to avoid secretive government action and particularly coercion.¹²³ Ironically, the presence of APA procedures in *ACT* did not prevent secretive government action and coercion. Perhaps informal agency actions are not intrinsically undemocratic and APA procedures not a guarantee against arbitrary government action. There is something to be said for negotiating with the regulated. Unlike the judiciary, the administrative system does not necessarily function best as an adversary system, the we-against-they posture.¹²⁴ While broadcasters are public trustees,¹²⁵ they are also businessmen. The public interest is not always at odds with broadcaster interests. Because of the economic relationship between broadcasters and viewers, broadcasters must be responsive to a significant number of viewers. It is not in the public interest to regulate broadcasters to the degree that their ability to make a profit is impaired. Government-imposed economic hardship can diminish whatever quality already exists in television. If the country is to maintain a commercial broadcast system, it is very much in the public interest to keep the industry healthy and profitable. Therefore, in representing the

118. *Id.* (citing *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 599 (D.C. Cir. 1973)).

119. *Writer's Guild of America v. American Broadcasting Co.*, 609 F.2d 355, 364 (9th Cir. 1979).

120. *Id.*

121. *Id.* at 365.

122. *Id.* at 363.

123. 423 F. Supp. 1064, 1073 (D.C. Cal. 1976).

124. Stewart discusses some attitudes of various groups toward formal adjudicatory proceedings as opposed to the informal rulemaking procedures. Ideally administrative action should provide for effective representation by all interests affected with the minimum commitment of resources possible. Interestingly, while informal consultation as is practiced by the British, SCHWARTZ & WADE, *LEGAL CONTROL OF GOVERNMENT* 98-101 (1972), seems potentially to meet those criteria, in practice public interest groups—those most often excluded from the administrative process—prefer the formal procedures. The reason seems to be in large part because they perceive the informal rulemaking procedure as consisting of *ex parte* negotiations with the regulated industry and rather perfunctory attention to public interest input. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1775-76 (1975).

125. *Writer's Guild of America v. American Broadcasting Co.*, 609 F.2d 355, 362 (9th Cir. 1979).

public interest, the Commission is in a position that requires a balancing of public needs and broadcaster needs.¹²⁶ In this view, a negotiating posture makes more sense, although its legitimacy under the APA is doubtful.

While there is some argument that informal FCC action is authorized by the charge of generally encouraging the larger and more effective use of television in the public interest, the use of jawboning, speeches, and "raised eyebrow" techniques is not authorized as a regulatory tool, is unstructured, and presents a strong possibility of arbitrary government action, especially in light of agency capture.¹²⁷ In addition to the problems of government accountability and coercion already discussed, other difficulties arise when these methods are used. For example, in testifying before the district court in *Writer's Guild*, former commissioner Nicholas Johnson discussed the use of speeches as a regulatory tool employed by the FCC.¹²⁸ He pointed out that sometimes speeches were used to try out a Commission idea on the industry and to begin a dialogue between the Commission and the industry; but others were meant to announce incipient agency policy and could be called official agency action.¹²⁹ He contended that the industry knew the difference.¹³⁰ Perhaps in the context of ongoing agency-industry interchange, the industry can distinguish between the two. Leaving agency action in the guessing game stage, however, seems inconsistent with APA purposes and can leave a court at sea in making the distinction, as was the case in *Writer's Guild*.

Another difficulty with both *ACT* and *Writer's Guild* so-called informal action is that while the agency was claiming that it had adopted no policy or rule, it was enforcing one. Some monitoring of licensee adherence to NAB Code changes was anticipated, particularly by questions appearing on the license application.¹³¹ Presumably, if the applicant did not meet some standard of children's or family programming, his receipt of the license was in question. The bottom line is that the FCC is enforcing rules it has not formally adopted. The reason for its not having adopted rules in *ACT* and *Writer's Guild* is that it believed that it could not come up with constitutional standards.¹³² In the *Writer's Guild* situation, the FCC wanted to avoid rulemaking because, as a practical matter, standards for family programming would be difficult to fashion.¹³³ No one could tell in many cases if a program was

126. *Id.*

127. "Capture" refers to the situation in which an agency is unduly influenced by the regulated industry. Various reasons are cited as fomenting capture including personnel career exchanges between the agency and regulated industry and insufficient agency resources resulting in agency reliance on industry information and cooperation. For a general discussion of the capture phenomenon, see B. COLE, *RELUCTANT REGULATORS* (1978); Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 189-93 (1978); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683-87 (1975).

128. 423 F. Supp. 1064, 1120 (C.D. Cal. 1976).

129. *Id.*

130. *Id.*

131. *ACT v. FCC*, 564 F.2d 458, 467 (D.C. Cir. 1977); *Writer's Guild of America v. FCC*, 423 F. Supp. 1064, 1149-50 (C.D. Cal. 1976).

132. See text accompanying note 63 *supra*.

133. 423 F. Supp. 1064, 1126, 1149-50 (C.D. Cal. 1976).

“appropriate for family viewing.”¹³⁴ Yet licensees were being required to operate as if there were standards and *their licenses potentially depended on their guessing correctly.*

The presence of proper agency procedures is not a guarantee against improper agency action, as evidenced in *ACT*. The agency’s formal action in *ACT* was a no-action stance, yet the agency was revising its license application to monitor children’s programming.¹³⁵ In order to get at the essence of the agency’s action, the court had to examine more closely the *ex parte* contacts that took place. While it is not clear how closely the *ACT* court looked at the informal communications, it is difficult to believe that had it scrutinized them carefully, it would have found them acceptable.

IV. CONCLUSION

In *ACT*, the jawboning technique was used by the FCC to accomplish *ex parte* what it believed it could not constitutionally accomplish through adopting rules. Because it followed APA section 553 procedures, however, giving interested parties a fair hearing and providing the court with more than the statutorily-required record, the Commission’s action was found to be both fair and legal.¹³⁶ While theoretically the agency’s *ex parte* contacts are not open to judicial scrutiny beyond that exercised by the *ACT* court,¹³⁷ because of the nature of the *ex parte* contacts, the court should have gone beyond the traditional *ex parte* contacts analysis. The traditional analysis makes more sense when the *ex parte* influences are industry attempts to influence the agency, contacts which may be decisive in formulating the rules but which are not reported in the agency’s record, preventing effective judicial review. That analysis does not go far enough when the court is confronted with *ex parte* contacts whose direction is from the government to the industry and which are used to implement policy in lieu of informal rulemaking procedures or, as in *ACT*, parallel to section 553 procedures.

If the *ACT* ruling continues to guide the courts and the *ex parte* contacts—even those raising questions of coercion and government accountability—are found to be unreviewable, the FCC seems to have unrestrained

134. *Id.*

135. 564 F.2d 458, 467 (D.C. Cir. 1977).

136. *Id.* at 471.

137. The Supreme Court recently has reinforced the idea of judicial restraint when informal rulemaking is involved in *Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc.* 453 U.S. 519 (1978). In a unanimous decision the Court stated that as long as an administrative agency met the bare minimum APA § 553 procedures, a court could not impose additional procedural requirements on an agency. The Court stated: “Absent constitutional constraints or extremely compelling circumstances, the administrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods capable of permitting them to discharge their multitudinous duties.’ ” *Id.* at 1211. Despite this decision, courts have apparently continued to impose some procedural safeguards on § 553 proceedings, distinguishing the cases or invoking the “basic fairness/need for effective judicial review” litany traditionally covering agency action. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6:18 (1978) (citing *National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345 (D.C. Cir. 1978) and *United States Lines, Inc. v. Federal Maritime Comm’n.*, 584 F.2d 519 (D.C. Cir. 1978)).

discretion to coerce industry compliance with policy it prefers not to enforce, for whatever reasons.¹³⁸

It is conceivable that the plaintiffs in *Writer's Guild* will be required to begin again with their complaint before the FCC and to follow the Communications Act procedures outlined for one aggrieved by agency action.¹³⁹ Should the controversy wind up in the D.C. Circuit on appeal and that court follow its analysis in *ACT*, the court will likely (1) find no reviewable agency action, but rather informal agency action in line with the FCC's charge to encourage generally the more effective use of television; or (2) find agency action, require the institution of section 553 informal rulemaking procedures, and avoid dealing with the substance of the jawboning, treating it as *ex parte* contacts safe from judicial probing.

Courts and congressmen have tread lightly in the area of *ex parte* contacts in informal rulemaking procedures. As a practical matter, they recognize an agency's dependence on these informal contacts to obtain information, to obtain cooperation, and to avoid the cumbersome, expensive procedures when something short of APA—negotiations, jawboning, speeches—can accomplish the desired end.¹⁴⁰ But the unbridled discretion which traditional analysis of *ex parte* contacts allows the FCC has the anomalous effect of condoning just those agency activities the APA was designed to prevent. *Ex parte* contacts are as important to an agency as lobbying is to a congressman.¹⁴¹ Even lobbying has restrictions placed on it.¹⁴²

The bottom line is that the courts must look more closely at the nature of the *ex parte* contacts if there is sufficient reason to believe that the agency has abused its discretion under the guise of permissible informal contacts. Courts cannot be distracted by the presence of apparently proper administrative procedures, which may merely camouflage what the agency has actually done. If the *ex parte* contacts constitute agency efforts to influence the industry, the court should examine them to be sure that they are "permissible regulatory activity" and not "impermissible 'raised eyebrow' harassment of vulnerable licensees."¹⁴³ Admittedly, distinguishing between the two is often a difficult task.¹⁴⁴ In both *ACT* and *Writer's Guild*, however, there was ample

138. See text accompanying notes 93–113 *supra*.

139. See text accompanying note 89 *supra*.

140. Even in *Home Box Office*, where the court found *ex parte* contacts in informal rulemaking impermissible, the court conceded that the informal contacts between the public and the agency were the "bread and butter" of the administrative process and completely appropriate within the bounds it defined. 567 F.2d 9, 57 (D.C. Cir. 1977).

141. See text accompanying notes 7–9 *supra*.

142. See Regulation of Lobbying Act, 2 U.S.C. §§ 261, 276 (1976).

143. *Writer's Guild of America v. American Broadcasting Co.*, 609 F.2d 355, 365 (9th Cir. 1979).

144. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 230 (1978).

evidence—publicity in popular and trade press, FCC monitoring of licensees for compliance with NAB Code changes—that the FCC was doing more than merely “encouraging” and was doing it despite its own admission that such a policy enacted by the Commission would most likely be unconstitutional.¹⁴⁵

Mary R. Brandt

145. See text accompanying notes 63–64 *supra*.

